Chin Ah Keow @ Chin Lai Sitt v Anggun Pintas Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS D5–24–344 OF 2004
RAMLY ALI J
25 FEBRUARY 2005

Companies and Corporations — Winding up — Liquidators — Appeal against decision of liquidator — Application to declare sale and purchase agreement null and void — Paramount consideration of liquidator when liquidating company's assets — Court slow to interfere with decision of liquidator — Companies Act 1965 s 279

Contract — Tender — Contract — Plaintiff's offer not accepted — Whether any contractual right to insist that tender would be fairly considered

The first defendant ('D1') was the registered shareholder of the entire issued and paid-up capital of Rahman Hydraulic Tin Sdn Bhd ('RHT'). The second and third defendants ('the liquidators') were appointed the liquidators of D1.

The liquidators had advertised an open tender exercise to invite parties to offer for purchase the shares in RHT held by D1 ('the said shares'). The plaintiff and the fourth defendant ('D4') were among the eight parties who had tendered for the purchase of the said shares. The plaintiff submitted a tender price of RM8.826 million whereas D4 had offered to purchase the said shares for RM15 million, subject to a condition that the mining lease granted to RHT was renewed by the State Government ('the condition').

The liquidators had initially awarded the tender to a company, MPAM, who was the highest bidder. The award to MPAM was subsequently terminated due to the non-compliance by MPAM with certain conditions in the sale and purchase agreement. After the termination, the liquidators proceeded to accept D4's tender, after the condition was withdrawn by D4. A sale and purchase agreement ('the SPA') was then entered into between D1 and D4.

This was the plaintiff's application for, *inter alia*, a declaration that the SPA be declared null and void.

Held, dismissing the application:

(1) The function of the court under s 279 of the Companies Act 1965 ('the Act') was to hear the matter as a strict appeal from the decision of the liquidator. The powers given to the court were to consider whether the act or decision of the liquidator was right or otherwise. To do this the court must have regard to the circumstances which were before the liquidator at the time of his act or decision and not to circumstances subsequently arising (see para 16).

(2) Therefore, under s 279 of the Act, the court should be slow to interfere with the act or decision of the liquidator in discharging his roles in a company's liquidation, particularly in matters involving the sale of the company's assets as this would involve commercial considerations (see para 18).

(3) In the present case, the paramount consideration to be considered by the liquidators in liquidating D1's assets was the interest of D1's creditors. It was therefore the liquidators' fundamental duty to obtain the highest possible price for the said shares (see para 19).

(4) By accepting D4's offer, D1 had gained an additional sum of RM1.32 million. Any reasonable liquidator would have acted in the way which the liquidators did. Therefore, the court should not disturb the exercise of discretion by the liquidators as the plaintiff had failed to show that they had acted utterly unreasonably or had taken wrong considerations into account or failed to take into account relevant consideration in making the decision to accept D4's offer (see para 21).

(5) The withdrawal of the condition by D4 did not amount to submission of a fresh tender as alleged by the plaintiff. At that point of time, the tender exercise was already closed and the liquidators were at liberty to exercise their discretion and discuss the tender with any of the offeror. These powers were conferred upon the liquidators as provided for in the information memorandum. Therefore, there was no issue of there being a subsequent bid by D4. Further, the liquidators were under no obligation to inform the plaintiff on the withdrawal of the condition by D4 as the information memorandum did not provide for such an obligation (see para 24).

(6) In any case, the plaintiff's application to set aside the SPA was an exercise in futility as the transaction had already been completed and the daily operations of RHT were now run by D4. The balance of justice inclined in favour of dismissing the plaintiff's application (see para 25).

(7) The plaintiff's offer had not been accepted by D1. Clearly, there was no contract between the plaintiff and D1. The plaintiff did not have any contractual right to insist that its tender would be fairly considered together with the other tenders. The information memorandum clearly stipulated that the liquidators were not obliged to accept the highest tender or even any tender at all (see para 28); *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] All ER 25 distinguished.

[**Bahasa Malaysia summary**

Defendan pertama ('D1') merupakan pemegang syer berdaftar bagi kesemua modal berbayar dan diterbitkan Syarikat Rahman Hydraulic Tin Sdn Bhd

A ('RHT'). Defendan kedua dan ketiga ('penyelesai tersebut') telah dilantik sebagai penyelesai D1.

Penyelesai tersebut telah mengiklankan sebuah proses tender terbuka bagi menjemput mana-mana pihak untuk membuat tawaran membeli syer syarikat RHT yang dipegang oleh D1 ('syer tersebut'). Plaintif dan defendan keempat ('D4') merupakan antara lapan pihak yang telah membuat tender bagi membeli syer tersebut. Plaintif telah mengemukakan harga tender sebanyak RM8.826 juta manakala D4 telah membuat tawaran membeli syer tersebut untuk RM15 juta atas syarat hak milik pajakan perlombongan yang telah diberi kepada syarikat RHT diperbaharui oleh Kerajaan Negeri ('syarat tersebut').

C

Penyelesai tersebut telah pada awalnya memberi tender tersebut kepada sebuah syarikat, MPAM, yang merupakan penawar tertinggi. Ini kemudian dibatalkan kerana MPAM tidak patuh kepada beberapa syarat di dalam perjanjian jual beli. Penyelesai tersebut kemudian menerima tender D4 selepas syarat tersebut ditarik balik oleh D4. D1 dan D4 kemudian memasuki satu perjanjian jual beli ('SPA tersebut').

Ini merupakan permohonan plaintif untuk, *inter alia*, suatu deklarasi bahawa SPA tersebut diisytiharkan tidak sah.

E **Diputuskan**, menolak permohonan tersebut:

(1) Fungsi mahkamah di bawah s 279 Akta Syarikat 1965 ('Akta tersebut') adalah untuk mendengar perkara tersebut sebagai rayuan daripada keputusan penyelesai tersebut sahaja. Kuasa yang diberi kepada mahkamah adalah untuk menimbang sama ada perbuatan atau keputusan penyelesai tersebut sah atau tidak. Bagi berbuat demikian, mahkamah ini mesti memberi perhatian kepada situasi yang dihadapi oleh penyelesai tersebut pada masa keputusan tersebut dibuat dan bukan kepada situasi yang timbul kemudian (lihat perenggan 16).

(2) Oleh itu, di bawah s 279 Akta tersebut, mahkamah sepatutnya tidak cepat campur tangan dengan perbuatan atau keputusan penyelesai dalam menjalankan tanggungjawabnya di dalam mana-mana syarikat dalam penyelesaian, terutamanya di dalam perkara yang melibatkan penjualan aset syarikat tersebut kerana ini melibatkan pertimbangan komersil (lihat perenggan 18).

(3) Di dalam kes ini, pertimbangan terpenting yang perlu dipertimbangkan oleh penyelesai tersebut semasa menyelesaikan aset D1 adalah kepentingan pemiutang D1. Oleh itu, kewajipan asas penyelesai tersebut adalah untuk mendapatkan harga tertinggi bagi syer tersebut (lihat perenggan 19).

(4) Dengan menerima tawaran D4, D1 telah memperoleh tambahan sebanyak RM1.32 juta. Mana-mana penyelesai yang munasabah tentunya akan berbuat sedemikian. Oleh itu, mahkamah tidak patut mengganggu

keputusan budi bicara penyelesai tersebut kerana Plaintif telah gagal menunjukkan bahawa penyelesai tersebut telah bertindak secara tidak munasabah atau telah mengambil pertimbangan yang salah atau telah gagal mengambil kira pertimbangan yang relevan semasa memutuskan untuk menerima tawaran D4 (lihat perenggan 21).

(5) Penarikan balik syarat tersebut oleh D4 tidak bermakna terdapat suatu penyerahan tender baru seperti yang didakwa oleh plaintif. Pada masa itu, proses penerimaan tender telah ditutup dan penyelesai tersebut mempunyai kuasa untuk menggunakan budi bicara mereka dan berbincang dengan pembuat tawaran yang lain mengenai tender tersebut. Kuasa tersebut yang terdapat di tangan penyelesai terkandung di dalam memorandum informasi. Oleh itu, tiada isu yang timbul berkenaan tawaran baru oleh D4. Tambahan pula, penyelesai tersebut tidak mempunyai kewajipan untuk memberitahu plaintif mengenai penarikan balik syarat tersebut oleh D4 kerana kewajipan tersebut tidak terkandung di dalam memorandum informasi tersebut (lihat perenggan 24).

(6) Dalam apa keadaanpun, permohonan plaintif untuk mengetepikan SPA tersebut merupakan usaha yang sia-sia kerana transaksi tersebut telahpun ditamatkan dan operasi harian syarikat RHT dikendalikan oleh D4. Imbangan keadilan memihak kepada menolak permohonan plaintif (lihat perenggan 25).

(7) Tawaran plaintif belum lagi diterima oleh D1. Adalah jelas bahawa tiada kontrak wujud di antara plaintif dan D1. Plaintif tidak mempunyai apa-apa hak kontraktual untuk mendesak supaya tender mereka dipertimbangkan secara adil bersama tender-tender yang lain. Memorandum informasi menyatakan dengan jelas bahawa penyelesai tersebut tidak diwajibkan untuk menerima tender yang tertinggi ataupun sebarang tender (lihat perenggan 28); *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] All ER 25 dibezakan.]

Notes

For cases on liquidators, see 3(1) *Mallal's Digest* (4 th Ed, 2003 Reissue) paras 1056–1087.

For a case on tender generally, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 4572.

Cases referred to

Avon Downs Pty Ltd v FC of T [1949] 78 CLR 353 (refd)

Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council [1990] All ER 25 (dist)

Cheng Keng Hong v Government of the Federation of Malaya [1966] 2 MLJ 33 (refd)

Edennote Tottenham Hotspur Plc & Ors v Raymon & Ors [1995] 2 BCLC 248 (refd)

Equity Funds of Australia (in liquidation), Re (1985) 2 ACLR 238 (refd)
Food Corporation of India v MS Kambhenu Cattle Food Industries 1993 AIR SC 1601 (refd)
Kian Joo Holdings Sdn Bhd (in liquidation, Re) [1999] 6 MLJ 352 (refd)
Leon v Yorkomatic [1966] 3 All FR 277; [1966] 1 WLR 145 (refd)
Mineral Securities Australia (in liquidation), Re [1973] 2 NSWLR 207 (refd)
Sanderson v Classic Car Insurance Pty Ltd (1985) 10 ACLR 115 (refd)

Legislation referred to

Companies Act 1965 s 279

Jeev Arnand (How, Zul & Low) for the plaintiff.
T Sunther (A Zahari & Rakan-Rakan) for the first, second and third defendants.
Jay Singam (Ghazi &Lim) for the fourth defendant.

Ramly Ali J:

[1] In his Originating Summons dated 22 November 2004 (encl 2) the plaintiff sought the following reliefs:

(1) A declaration that the award given by the second and third defendants to the fourth defendant pursuant to an open tender exercise by the second and third defendants in relation to the entire issued and paid up share capital of 97,232,142 ordinary shares of RM1 each of Rahman Hydraulic Tin Sdn Bhd ('RHT Shares') is null and void;

(2) That the aforesaid award is set aside;

(3) A declaration that the sale of shares agreement and other related documents between first defendant who is represented by the second and third defendants and the fourth defendant dated on or about 1 October 2004 for the purchase of the entire RHT Shares for a sum of RM15 million in cash is null and void;

(4) An order that the aforesaid sale and shares agreement and other related documents thereof is cancelled within 14 days from the date of this order;

(5) In the alternative, if the transfer of RHT Shares to the fourth defendant has been completed, a declaration that the said transfer of RHT Shares is null and void;

(6) An order that the second and third defendants reconsider tenders made by the other remaining tenderers in the open tender exercise except the fourth defendant's tender and to decide the said open tender within 14 days from the date of this order;

(7) General damages to be assessed by the registrar of this court which is to be paid by the second and third defendants to the plaintiff; and

(8) Costs.

[2] Vide summons in chambers dated 22 November 2004 (encl 4) the plaintiff sought the following interlocutory injunctive reliefs:

(1) to restrain the defendants from proceeding with the sale of shares agreement in respect of the purchase of the RHT Shares including the transfer of those RHT Shares to the fourth defendant until final disposal of the plaintiff's originating summons (encl 2);

(2) In the alternative, in the even the said RHT Shares had been transferred to the fourth defendant, to restrain the fourth defendant from taking part or interfering with the business operation or daily administration of RHT Sdn Bhd including matters relating to tin mines lease in Klian Intan, Perak and other related matters until final disposal of the plaintiff's originating summons (encl 2).

UNDISPUTED FACTS

[3] RHT was formerly known as Rahman Hydraulic Tin Berhad ('RHTB'), a company listed on the Main Board of Kuala Lumpur Stock Exchange ('KLSE'). On 16 June 2000, special administrators ('SAs') were appointed over RHTB pursuant to the Pengurusan Danaharta Nasional Bhd Act 1998, RHTB was insolvent with debt in excess of RM399 million, the SAs prepared a workout proposal to restructure RHTB pursuant to the said Act. Pursuant to the restructuring undertaken by the SAs RHTB was delisted from the KLSE and converted to a private limited company (sdn bhd) and the entire shareholding of RHTB was transferred to the first defendant. The first defendant was the registered owner of 97,232,142 ordinary shares of RM1 each in Rahman Hydraulic Tin Sdn Bhd ('the RHT Shares') at all material time. RHT is a tin ore producer in Malaysia and it has been granted a lease to operate a tin mine with the right to enter, occupy and mine by the Pejabat Daerah dan Tanah, Pengkalan Hulu, Hulu Perak, Perak Darul Ridzuan on that piece of land measuring approximately 601.935 acres in Klian Intan, Perak Darul Ridzuan. The mining right granted to RHT vide mining certificates 1/2003, 2/2003, 4/2003 and 5/2003 expired on 31 December 2003. However, the application for renewal of the said mining right is still pending in the Land Office.

[4] The first defendant is a company incorporated in Malaysia and is presently under creditors voluntary liquidation wherein the second and third defendants are the appointed liquidators of the said company.

[5] On 31 July 2004, the second and third defendant had advertised an open tender exercise to invite parties to offer for purchase the entire RHT shares together with it's assets and mining leases. A copy of the information memorandum was prepared by the second and third defendant of the intended tender setting out the necessary information, guidelines and terms of the aforesaid tender. The said information memorandum was made available at a cost of RM100 to all interested parties subject to confidential statement signed by interested parties.

[6] The plaintiff and the fourth defendant are among the eight tenderers who had participated in the aforesaid exercise. The plaintiff in reliance to the advertisement and information memorandum had on 18 August 2004 submitted his tender to the second and third defendants with a tender price of RM8,826,126 earnest deposit and other documents required to purchase the entire RHT Shares. In pursuant too s 6.9 of the information memorandum all the tenders submitted to the second and third defendants were opened before all the tenderers on the closing date and closing time wherein all the tenderers were given opportunity to read and peruse all other tenders. The fourth defendant had offered to purchase the RHT Shares with a tender price of RM15 million and initially subject to a condition that approval is first obtained for the application for renewal of mining lease and the mining lease is renewed by the State Government.

[7] The second and third defendants had initially awarded the tender to the highest bidder, MP Asset Management Sdn Bhd on 20 August 2004. (The plaintiff's offer was the sixth highest from the eight offers received). Later, the award to MP Asset Management Sdn Bhd was terminated because the said company had not complied with the terms and conditions of the sales of shares agreement with the first defendant. After the termination, the second and third defendants had proceeded to accept the tender of RM15 million submitted by the fourth defendant because it was the second highest tender received, only after the fourth defendant withdrawing the condition attached to its original tender ie a condition that approval is first obtained for the application for renewal of mining lease by the State Government. The first defendant accepted the fourth defendant's offer (without the condition) and thereafter a sales of shares agreement was entered into on 1 October 2004.

THE PLAINTIFF'S COMPLAINT

[8] The plaintiff alleges, among others that:

(i) The second and third defendants had acted arbitrarily and/or illegally by not rejecting the fourth defendant's original tender even though the said tender is not in compliance s 5 of the said memorandum wherein the same was not submitted on an 'as is where is' basis.

(ii) The second and third defendants had acted arbitrarily and/or illegally without the plaintiff's and other tenderers knowledge by allowing the fourth defendant to withdraw the said condition after the closing date ie on or about 22 November 2004. The submission by the fourth defendant without the condition being a fresh tender wherein the second and third defendants had acted arbitrarily and/or illegally thereafter by not allowing fresh tenders from the plaintiff or other remaining tenderers.

(iii) The second and third defendants by accepting the fourth defendant's fresh tender had acted in breach of the plaintiffs legitimate expectation that his tender and all other remaining tenders would be considered fairly and equally without any discrimination.

[9] The plaintiff is seeking to challenge the decision of the second and third defendants (as liquidators of the first defendant) to accept the tender submitted by the fourth defendant pursuant to s 279 of the Companies Act 1965.

THE ADVERTISEMENT AND INFORMATION MEMORANDUM

[10] On 31 July 2004, an advertisement was taken out by the first defendant on the order of the second and third defendants vis-a-vis 'offers are invited for the purchaser of the entire shareholding in an operating tin mine company located in Klian Intan, Pengkalan Hulu, Hulu Perak'. In the said advertisement (p 000003 of encl 1) the first, second, and third defendants had expressly stated that 'the liquidators reserved the rights not to select any tender and are not bound to accept the highest tender'.

[11] On the cover of the information memorandum it has been clearly stated by the second and third defendants as follows:

> This information memorandum is for information purpose only and does not have any legal effect. It may be supplemented or modified from time to time by notification to the registered recipient. This information memorandum does not constitute an offer for the purchase of RHT share and shall not be interpreted as an offer document.

[12] Another important provision in the information memorandum is in s 2 (at p 000016 of encl 1) which states as follows:

> Section 2 — Introduction
>
> The liquidators reserve the right to:
>
> (1) provide additional information or amend the information already provided in any way a their sole discretion;
>
> (2) negotiate with one or more prospective tenderer (s) at any time;
>
> (3) enter into sale of shares agreement and any other agreements without prior written notice to all recipients of this information memorandum;

(4) terminate the participation in the tender(s) of any party at any time and to modify any procedure without the need for explanation or prior notice; and

(5) change the schedule of tender(s) events detailed in s 3.0.

The liquidators rerserves the right not to select any tender and are under no obligation to select a tender or to provide an explanation for their decision.

[13] Section 6 of the information memorandum provides as follows:

Section 6.1 — Outlines

... in respect of the above, the liquidators reserve the right to:

(a) vary any of the criteria, without prior notice to the tenderer(s);

(b) add, vary, modify and delete any aspects of the tender(s) received, after conclusion with the tenderers);

(c) negotiate any aspect of the tender(s) with the respective tenderer(s);

(d) not to select any tender(s) and/or call for fresh submission oftender(s) by the respective tenderer(s) and/or any other interested parties; and

(e) not to provide any explanation for decision on short listing of tender(s).

Section 6.5 — Offer period for the tenders submitted

The tender(s) submitted will be good for 180 days from the closing date. Nevertheless, the liquidators, may, if deemed necessary, at their sole and absolute discretion, extend the validity period of 180 days.

Any tenderer(s) wishing to withdraw their tender(s) within the 180-day period or the extended period will have their earnest monies forfeited as agreed liquidate damages.

Section 6.10 — Evaluation of tenders

Upon receipt of all the tenders, the liquidators will undertake an evaluation exercise to select the successful tenderer(s).

Any tender(s) submitted which does not comply with the terms and conditions as contained may be disqualified and may not be considered for evaluation by the liquidators. The liquidators may at their sole and absolute discretion request for such further information and documents to the liquidators upon request by the liquidators to do so.

The liquidators are not bound to accept the highest tender(s) Price or any tender(s) and the liquidators are under no obligation to provide an explanation for their decision and the liquidators decision shall be final and binding.

Section 6.11 — Acceptance of tender

The liquidators shall be entitled to vary any of the terms herein by written notification to the tenderer(s) and to agree to an other terms and conditions as it deem fits.

Acceptance of any tender(s) shall be subject to the sole and absolute discretion of the liquidators.

The liquidators will inform the successful tenderer in writing by sending a Notice of acceptance of tender by post or dispatch or facsimile transmission at the contact details provide in the tender submitted. The earnest monies paid shall become and be treated for all purposes as the said deposit mentioned on s6.13 below which shall be payable upon the singing of the agreement and/or any related legal documents to be executed to effect the sale to the successful tenderer.

Upon acceptance of the tender by the liquidators and until the execution of the SSA and/or other related legal documents by the respective parties pursuant to s6.13 below, in the event that any tenderer(s) wishing to withdraw their tender, The earnest money paid shall immediately be forfeited forthwith by the liquidators as agreed liquidated damages.

Section 6.12 — Unsuccessful tender (s)

The earnest monies paid by the unsuccessful tenderer(s) shall be refunded, free of any interest, by post, despatch at the contract details provided for in the tender(s) submitted.

SECTION 279 OF THE COMPANIES ACT 1965

[14] Section 279 of the Companies Act 1965 provides that any person aggrieved by an act or decision of a liquidator may apply to the court which may confirm, reverse or modify the act or decision complained of and make such order as it thinks just. Under this section, the court has a discretion to interfere with the act or decision of the liquidators eventhough there is provision in the information memorandum to say that the acceptance of any of the tenders shall be subject to the sole discretion of the liquidators.

[15] In *Edennote Tottenham Hotspur Plc & Ors v Raymon & Ors* [1995] 2 BCLC 248, it was held that the court could only interfere with the exercise of a liquidator's decision to sell the assets of an insolvent company in very exceptional circumstances and would not do so unless it could be shown that he had acted utterly unreasonably or, though acting in good faith took into account considerations which he ought not to have taken into account or failed to take into considerations which he ought to have taken into account. This similar test has also been applied in the case of *Re Equity Funds of Australia (in liquidation)* (1985) 2 ACLR 238 and the case of *Re Mineral Securities Australia (in liquidation)* [1973] 2 NSWLR 207. In *Re Equity Fund of Australia* Bowen CJ in Eq held:

In my view, the test to be applied under s 279 is similar to that applying to the exercise of a discretion which is committed by statute to some particular official. The principles applied by the court in such cases are reasonably well settled. The court will recognise that the discretion has been vested by the statute in the liquidator and will not interfere unless it is shown that he did not address himself to the correct question or that, he made errors of law or that he failed to take into account relevant matters or that he took into account irrelevant matters, to which may be added that if his decision in the circumstances appears such that no reasonable man could arrive at it, the court will interfere (see generally *Avon Downs Pty Ltd v FC of T* (1949) 78 CLR 353; *Re Mineral Securities Australia (in liquidation)* [1973] 2 NSWLR 207; *Leon v Yorkomatic* [1966] 3 All FR 277; [1966] 1 WLR 145).

[16] The function of the court under s 279 is to hear the matter as a strict appeal from the decision of the liquidator. The powers given to the court are to consider whether the act or decision of the liquidator was right, so that it should be confirmed, or was wrong, so that it should be reversed, or partly right and partly wrong, so that it should be modified. To do this the court must have regard to the circumstances which were before the liquidator at the time of his act or decision and not to circumstances subsequently arising. Itwas further stressed in that case (*Re Equity Funds of Australia*) that the court will not interfere simply because it's opinion might differ from that of the Liquidator.

[17] A liquidator is an officer of the court, and the modern liquidator today performs many of the functions which in former ages were dealt with by a judge, registrar, at least in the first instance. In addition, the persons eligible to be registered and appointed liquidators only are so eligible because they possess not only the appropriate qualifications in accounting, but also are experienced in the world of commerce. The companies legislations and orders of the court these days usually commit the entire conduct of liquidation to the liquidator and empower him to do what is in his commercial judgment he thinks best in the interest of the creditors as a whole.

(See *Sanderson v Classic Car Insurance Pty Ltd* (1985) 10 ACLR 115, Supreme Court of New South Wales.)

[18] That being the case, the court under s 279 of the Companies Act 1965 should be slow to interfere with the act or decision of liquidators in discharging their roles in company's liquidation particularly in matters involving sales of company's assets which involve commercial considerations. The court can only interfere in very exceptional circumstances when the liquidators has acted utterly unreasonably.

[19] In the present case, the paramount considerations to be considered by the second and third defendant as liquidators in liquidating the assets of the first defendant company is the interest of the creditors. In liquidation, the company is said to be insolvent. It is therefore the fundamental duty of the second and third defendant (as liquidators) to obtain the highest possible price

for the RHT Shares. The interest of the creditors is best served if the liquidators manage to obtain the most out of the company's assets and properties.

[20] The second and third defendants as liquidators are imposed with the responsibility and is recognised as having both the qualification and access to the multiplicity of information which may be necessary in order to accept the best tender. The decision of the second and third defendants is a commercial decision made solely for the benefit of the first defendant as well as it's creditors.

(See *Re Kian Joo Holdings Sdn Bhd (in liquidation)* [1999] 6 MLJ 352.)

[21] In the present case, in exercising their duties and the right reserved by the liquidators as stated in the information memorandum (particularly ss 2, 6.1. 5.5, 6.10 and 6.11) the second and third defendants accepted the fourth defendant's withdrawal of conditions attached to it's original offer and ultimately accepted the fourth defendant's offer — the second highest offer at a price of RM15 million. The third highest offer was RM13,680,000. By accepting the fourth defendant's offer, the first defendant would benefit an additional sum of RM1,320,000. Any reasonable liquidator would have acted in the way the second and third defendants did. Therefore, the court should not disturb the exercise of discretion by the second and third defendants as the plaintiffs has failed to show that the second and third defendants had acted utterly unreasonably or took into account wrong considerations or failed to take into account relevant consideration in making the decision to accept the fourth defendant's offer.

[22] The second and third defendants' acceptance of the fourth defendant's offer was in accordance with the provisions of s 6.10 and 6.11 of the information memorandum. The right of the liquidators in this case in accepting the fourth defendant's offer is further provided in s 2 and 3 of the information memorandum ie they reserve the right to negotiate with one or more prospective tenderer at any time and the right not to select any tender and are under no obligations to select a tender or to provide an explanation for their decision.

[23] It is not disputed that the offer by the fourth defendant of RM15 million was much higher than the plaintiff's offer of RM8 million. Also there is no evidence to show that the second and third defendants exercised their discretion without *bona fide*. The first defendant had gained RM7 million by selling the RHT Shares to the fourth defendant. If the second and third defendants had accepted the plaintiff's tender of RM8 million, they would not be acting in the first defendant's best interest.

[24] The withdrawal of the conditions by the fourth defendant did not amount to submission of a fresh tender as alleged by the plaintiff. At this point of time, the tender exercise had already been closed and the second and third defendants were at liberty to exercise their discretion and discuss with

any other tender. These power are conferned upon the liquidators as provided in s 2 and 6 of the information memorandum. Therefore, there is no issue of initial bid and/or subsequent bid by the fourth defendant. The second and third defendants are under no obligation to inform the plaintiff on the withdrawal of the condition's by the fourth defendant. The information memorandum does not provide for such obligation. Furthermore, the plaintiff had in the first place failed to comply with the conditions in the information memorandum by not signing the letters dated 18 August 2004 submitting the irrevocable tender. In other words, technically the plaintiff's tender was not duly signed. The plaintiff basically did not get-off the starting block. He cannot now cry foul for his own non-compliance.

[25] The plaintiff's action in settling aside the share sale transaction is also an exercise in futility as the transaction has been completed. The completion date of the share sale agreement was on 22 November 2004. The daily operations of the company (RHT) is now run by the fourth defendant. To set aside the sale transaction and to declare it was null and void as well as to issue an injunction to restrain the fourth defendant from interfering with the administration of RHT under the present circumstances is not a commercially viable decision. It serves no good to the company as well as the shareholders, employees and creditors. The balance of justice inclines more to refuse the plaintiff's application.

[26] Another issue which need to be considered here is: whether there is any contract between the plaintiff and the first defendant in respect of the tender?

[27] The law on tender in Malaysia is similar to that of English law vis-a-vis the invitation for tender is basically inviting offerrors and unless and until the offer is accepted, there is no concluded contract between the offerer and the offeree. This point was made clear by Raja Azlan Shah J in the case of *Cheng Keng Hong v Government of the Federation of Malaya* [1966] 2 MLJ 33 where it was held:

> the law with regard to acceptance of a tender is perfectly clear. The unconditional acceptance of a tender by the employer binds both parties, and a contract is thereby formed, the terms of which are ascertainable from the invitation to the tender, the tender, the acceptance and any other relevant documents.

[28] In the present case, the plaintiff's offer has not been accepted by the first defendant. It is within the knowledge of the plaintiff that the first defendant has accepted the highest bidder at the close of the tender, thereby the plaintiff's tender had been rejected or not accepted. Clearly, there is no contract ever existed between the plaintiff and the first defendant. The plaintiff, in his submission-in-reply, admitted that 'there is no legally binding contract between the first defendant and the plaintiff because another tender was accepted by the second and third defendants'. However, the plaintiff submitted that the plaintiff still has a contractual right ie that his tender which has conferned with the requirements

of the information memorandum would be fairly considered together with other conferring tenders. The plaintiff argued that this proposition is clearly seen in the case of *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] All ER 25 where it was held by the English Court of Appeal that:

> In certain circumstances an invitation to tender could give rise to binding contractual obligations on the art of the invitor to consider tenders which conform with the conditions of tender ... it was implied that if an invitee submitting a conforming tender before the dateline he would be entitled as a matter of contractual right to have his ender opened and considered along with other tenders that were considered....

[29] The court is of the view that the decision in that case (*Blackpool and Fylde Aero Club*) does not in any way help the plaintiff in the present application. The 'contractual right' mentioned in that decision refers to 'contractual right to have his tender opened and considered along with other tenders'. In the present case, there is no indication that the second and third defendants has not opened up and not considered the plaintiff's tender. The only evidence in relation to the plaintiff's tender here is that the plaintiff's tender at a price of RM8 million was the sixth highest and was not accepted by the second and third defendants. There is no contractual right to the effect that the plaintiff's tender must be accepted by the first defendant. The information memorandum clearly stipulates that the second and third defendants are not obliged to accept the highest tender or even any tender at all. The contractual right mentioned in that case (*Blackpool and Fylde Aero Club*) also states that the tender must 'conform with the conditions offender'. In the present case, the second and third defendant are at liberty to reject (or not to accept) the plaintiff's tender on the ground that it failed to comply with one of the requirements ie the tender was not signed by the plaintiff.

[30] On that premise, the court is of the view that the plaintiff has no basis to support this present application.

[31] The issue of legitimate expectation, was also raised by the plaintiff. The plaintiff claimed that the second and third defendants by accepting the fourth defendant's fresh tender had acted in breach of the plaintiff's legitimate expectation that his tender and all other remaining tenders would be considered fairly and equally without discrimination.

[32] In the first place, as stated earlier, the question of fresh tender submitted by the fourth defendant does not arise. The fourth defendant withdrew the condition attached to its earlier tender. That has been accepted by the second and third defendants. At that time the tender exercise has already been closed and the second and third defendants are at liberty to exercise their discretion and discuss with any tenderer.

[33] Section 6.1(d) of the information memorandum clearly empowers the second and third defendants 'not to select any tender and to call for fresh submission of tender by the respective tender or any other interested parties'.

[34] Section 6.1(b) empowers the second and third defendants to 'add, vary, modify and delete any aspects of the tender received, after conclusion with the tenderer'.

[35] Section 6.1(c) further empowers the second and third defendants to 'negotiate any aspect of the tender with the respective tenderer'. The plaintiff is aware about the terms and conditions of the tender as contained in the information memorandum. The plaintiff is also aware that there were a total of eight tenders including his tender submitted by interested parties. There were five other offers which were higher than the plaintiff's offer. Any legitimate expectation the plaintiff may have had is subject to the possibilities of the first, second and third defendants accepting the other higher offers which are unconditional offers and thus is only logical.

[36] What is legitimate expectation is a question of fact. In this respect the court is in full agreement with the ruling made in the case of *Food Corp of India v MS Kambhenu Cattle Food Industries* 1993 AIR SC 1601. In that case, the Supreme Court of India considered the legitimate expectation of a tenderer as follows:

> Whether the expectation of the claimant is reasonable or legitimate is a question of fact in each case. Whether the question arises it is to be determined not according to the claimant perception but in larger public interest wherein other more important consideration may outweigh what would otherwise have been the legitimate expectation of the claimant. A *bona fide* decision or public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny.
>
> Thus even though the highest tenderer(s) can claim no right to have his tender accepted here being a power while inviting tenderer(s) to reject all the tenderer(s) yet the power to reject all the tenderer(s) can not be exercised arbitrarily and must depend for its validity on the existence of cogent reasons for such action. The object of inviting tenderer(s) for disposal of a commodity is to procure the highest price while giving equal opportunity to all intending bidders to compete. Procuring the highest price for the commodity is undoubtedly in public interest since the amount so collected goes to the public fund.
>
> Accordingly, inadequacy of the price offered in the highest tender would be a cogent ground for negotiating with the tenderer(s) giving them equal opportunity to review their bids with a view to obtain the highest available price. A procedure wherein resort is had to negotiations with the tenderer(s) for obtaining a significantly higher bid during the period when the offers in the tender(s) remain open for acceptance and rejection of tender(s) only in he event of a significant higher bid being obtained during negotiations would ordinarily satisfy this requirement. This procedure involves giving due weight to the legitimate expectation of the highest bidder to have his tender accepted unless outbid by a higher offer within the time the offers remain open would be reasonable exercise of power for public good.

[37] The legitimate expectation as claimed by the plaintiff in the present case must be considered in the light of other considerations such as the terms

and conditions of the tender as contained in the advertisement and the information memorandum; the duty and obligation of the second and third defendants as liquidators in obtaining the highest return for the assets of the company in liquidation; the interest of creditors of the first defendant; that the plaintiff has failed to comply with certain condition of the tender by not signing the relevant letter submitting his tender.

[38] What is there for the plaintiff to expect if he has not complied with the requirements of the tender by not signing the relevant letter — as if his tender was not properly signed and not properly submitted.

[39] Even if his tender was properly submitted and signed, the plaintiff cannot expect to be awarded the sale of RHT Share, knowing fairly well that his offer was the sixth highest. There are five other offers higher than his offer. The plaintiff knew and ought to have know is that if the first, second and third defendants were to accept the plaintiff's RM8 million offer, the first defendant would suffer a loss of RM7 million which sum is the difference between the fourth defendant's offer and that of the plaintiffs.

[40] If the plaintiff complained that his tender was not considered fairly and equally by the second and third defendants, the court cannot entertain such complaints on the grounds that the plaintiff has failed to adduce any evidence to support that complaint and that what the second and third defendants did was in accordance with the provisions of the information memorandum which govern the process of the tender as a whole. The affidavits show that the plaintiff's tender was given due care and attention and was rejected (not accepted) because there are five other offers which were higher than the plaintiff's offer.

CONCLUSION

[41] As a whole the court is satisfied that the second and third defendants had not acted arbitrarily and/or illegally in accepting the fourth defendant's tender, which was the second highest after the highest offer by MP Asset Management was terminated for failure to comply with the relevant requirement. There is also no evidence to show that the second and third defendants had acted utterly unreasonably or had taken into account irrelevant considerations or failed to take into account relevant considerations. That being the case, the court is satisfied that this is not a proper case for the court to interfere with the act and decision of the second and third defendants as liquidators of the first defendant company. Therefore, the court finds that the plaintiff's application (both vide encl 2 and 4) are baseless and are dismissed with costs.

Plaintiff's application dismissed.

Reported by Peter Ling